No. 82-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D.H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ROBERT D.H. RICHARDSON

Allan M. Palmer
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Robert D.H. Richardson

November 1983

THE CASILLAS PRESS, INC. – 1717 K Street N. W. – Washington, D. C. – 223-1220

QUESTIONS PRESENTED

I

Whether a criminal defendant whose first trial ended in a hung jury has the right to immediately appeal from the denial of his motion to bar retrial on the ground of former jeopardy, when he alleges that the evidence at trial was legally insufficient to have sustained his conviction and he cannot therefore, be forced to "run the gauntlet" of a second prosecution.

II

If there is jurisdiction to consider the double jeopardy claim, whether the evidence at trial was legally sufficient to sustain the remaining two counts of the indictment – petitioner having been acquitted by the jury of the third count.[1]

---

[1]We observed in a footnote to the Question Presented in our petition (n. 1), that if there is appellate jurisdiction to entertain the double jeopardy claim, "then the sufficiency of the evidence *vel non* would be a subsidiary question fairly included in the Question Presented." Since the grant of certiorari did not limit us to the jurisdictional issue, the sufficiency of the evidence determination is properly before the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Page

Constitution and Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2113

ROBERT D.H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ROBERT D.H. RICHARDSON

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 702 F.2d 1079.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 11, 1983. A combined petition for rehearing and suggestion for rehearing en banc was filed on April 5, 1983, and denied on April 27, 1983. The petition for a writ

of certiorari was filed on June 27, 1983 and granted on October 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

Petitioner and one Leroy Cooper were jointly indicted in the United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846 (JA 9a). Cooper fled prior to trial and petitioner was tried to a jury resulting in a partial verdict of not guilty to one count of distribution and a mistrial on the remaining two counts following a deadlocked jury (JA 3a). Thereafter, petitioner renewed his motion for judgment of acquittal and also moved to bar retrial on the ground of former jeopardy (JA 3a). The district court denied these motions and petitioner appealed (JA 4a, 20a). The court of appeals (2-1) dismissed petitioner's interlocutory appeal for lack of jurisdiction (Pet. App. 1a-31a).

1. The evidence at trial showed that Special DEA Agent John Lee became acquainted with Leroy Cooper during the period between August and December of 1980. Cooper worked at a barber shop located at 1812 7th Street, N.W., Washington, D.C. During these four months Agent Lee

arranged to purchase narcotics from Cooper ten times (Tr. I 27-28).[2]

On September 21, 1980, Agent Lee made arrangements with Cooper to purchase narcotics the next day. On September 22 he met Cooper at the barber shop around 2:00 p.m. (Tr. I 29-30), and was told that he, Cooper, had to go get the "package" (Tr. I 72). After about 25 minutes they left in a vehicle driven by Cooper. The latter drove very erratically in an effort geared at counter-surveillance. They drove to Fifteenth and Ives Street, S.E. where Cooper parked and was given $5,000 by Lee (Tr. I 31-32, 120, 126). Cooper left and walked toward a Gino's restaurant. A short time later surveillance Agent Orville Kleppinger saw Cooper getting out of a Mercury Cougar convertible, bearing D.C. license tag number 432 238, which was stopped at the corner of 15th and K Streets, S.E. (Tr. I 123). During Cooper's absence Lee went to a telephone booth and called his office to give his location. Upon returning to the car Cooper informed Lee that his source was curious why Lee had used the telephone (Tr. I 33). Cooper then gave Lee a package containing about two ounces of heroin which tested out to be 31% pure (Tr. I 33-34, 188). Lee gave Cooper $100 for obtaining the drugs and they drove back to the barber shop (Tr. I 35-36). At about that same time surveillance Agent Kenneth Feldman spotted the Cougar that Kleppinger had seen earlier. He followed the car for several blocks when it pulled into a

[2]"Tr. I" refers to the volumes of the trial transcript consecutively paginated 1-372, containing all the testimony except for the direct examinations of Agents Andrew Johnson, William Vislay, and Charles West. "Tr. II" refers to the 36 page volume of transcript containing their direct testimony.

gas station and the driver-occupant, a black male, walked toward a phone booth. Feldman did not recognize him and, accordingly, had no occasion to identify petitioner at trial (Tr. I 124-127). Agent Lee never saw appellant on September 22 (Tr. I 54). No evidence was introduced by the Government establishing the registered owner of the Cougar.

Between September 22 and October 21, Agent Lee spoke to Cooper on the telephone five to ten times and purchased heroin from him once in a transaction unrelated to this indictment or petitioner (Tr. I 74-75, 190).[3] When Lee called Cooper on October 20, Cooper stated – Lee testified over objection[4] – that he knew Lee's last purchase was of poor quality but that the next purchase would be from the same source as the heroin Lee bought at 15th and Ives Streets in September (Tr. I 37-42, 187, 190-191). On October 21 Lee went to the barber shop, where Agent Andrew Johnson had set up video-tape surveillance (Tr. II 3-6). Lee and Cooper spoke outside and Cooper stated – Lee testified over objection (see n. 4) – that his source would bring the heroin to the shop as soon as Cooper called and placed the order (Tr. I 37-43, 191-192). Lee then left the area (Tr. I 43; Tr. II 7). About a half-hour later, petitioner drove up to the shop in a Mercury Cougar con-

---

[3]A continuance motion filed by petitioner on June 15, 1981, (JA 14a), outlined Cooper's other alleged sales to Lee. *I.e.*, Crim. No. 81-102, a five-count indictment naming Cooper alone for distributions on September 3, 9, 16, 30 and December 5 of 1980. Crim. No. 81-103, a four-count indictment alleging a conspiracy between Cooper and Larry Wyder plus two joint distributions by them on August 26 and 28, 1980. Wyder was named alone in count four.

[4]The objection was on the ground that a conspiracy had not been proven allowing for the introduction of this hearsay testimony against petitioner (Tr. I 40-42).

vertible with the same license tag number as the car involved in the September 22 transaction (Tr. II 7-8). Petitioner got out of the car, spoke to Cooper for several minutes, and drove off (Tr. II 7-8). When Lee returned to the barber shop, Cooper told him – Lee testified over objection (see n. 4) – that his source had been there, sensed the presence of police and therefore he and Lee would have to drive to another location (Tr. I 37-42, 187, 192-193). Lee and Cooper drove to that location, where Lee gave Cooper $2,500 (Tr. I 44-45). In the meantime, petitioner was observed by another agent getting into a yellow Buick being driven by Wesley McCray (Tr. II 9-10). After a second change of locations for the same reason, *i.e.*, the source sensed the presence of police, petitioner got out of the Buick and McCray drove the car to the 800 block of P Street where he met Cooper (Tr. I 45-47, 193, 280-281). Two or three minutes later Cooper returned to Lee's car and gave him a plastic bag containing over an ounce of heroin which tested out to be 30% pure (Tr. I 189). Petitioner's fingerprint was recovered from a piece of tape sealing the bag (Tr. I 48-49, 106, 113-114). Agent Lee did not see petitioner on October 21 (Tr. I 54, 75).

2. The jury acquitted petitioner on the substantive count relating to the September 22 distribution and failed to reach a verdict on the other two counts. Thereafter petitioner unsuccessfully moved for a judgment of acquittal and to bar retrial on the ground that the evidence regarding the remaining counts had been legally insufficient to support a conviction. Petitioner appealed from the district court's denial of his motion, and the court of appeals dismissed for want of jurisdiction. The court of appeals noted that its "ability to rule on [petitioner's] double jeopardy claim in any meaningful manner * * * depends on the appealability of the trial court's ruling on the suffi-

ciency of the evidence" (Pet. App. 3a). Since the trial court's order was not appealable as a final judgment, petitioner's double jeopardy claim was not subject to meaningful review *at this time* and accordingly, his appeal was ordered dismissed. The court further held that review of the issue would not be lost to petitioner, because he could raise that precise claim when appealing his conviction following his second trial (Pet. App. 5a-6a).

SUMMARY OF ARGUMENT

I.

Respondent concedes that petitioner has raised a valid double jeopardy claim and that he can challenge the sufficiency of the evidence presented at his first trial, which ended in a hung jury, *but only* when appealing his conviction at the second trial. Petitioner, on the other hand, relying upon *Abney v. United States,* 431 U.S. 651 (1977), urges that he is entitled to immediate interlocutory review of his claim in order to bar an unconstitutional retrial. Every foreseeable detriment to a criminal defendant flowing from a retrial in violation of the Double Jeopardy Clause present in *Abney* is extant here.

Respondent and the several courts of appeals it relies upon err in concluding that the insufficiency of the evidence claim's main thrust is to controvert the merits of the prosecution and, thus, fails to raise a collateral issue which is a requisite for interlocutory review. In reality, that single allegation of insufficiency yields two concurrent results: (1) it reveals a cognizable double jeopardy violation which bars reprosecution and, (2) it provides the factual answer to whether or not the alleged violation has been established. The claim *in limine*, thus meets the second

prong of the Court's test by raising a collateral and independent bar to the prosecution – respondent having conceded that petitioner has satisfied the other two prongs. Merely because the claim also possesses this secondary role as the factual determinant of whether or not an alleged double jeopardy violation has been proven, cannot vitiate its main function of barring reprosecution – a common goal it shares with all other double jeopardy claims, no matter how diverse their factual bases for relief may be. In any event, the raising of a cognizable double jeopardy violation which if proved bars the prosecution, *automatically* satisfies the criteria for interlocutory review.

II

In assaying the sufficiency of the evidence to support the alleged conspiracy – excluding, of course, consideration of all hearsay statements of Leroy Cooper implicating petitioner in any such scheme introduced over objection – it is clear that only one narcotic transaction involving petitioner was proved, *i.e.*, October 21, 1980. The sale one month earlier to Leroy Cooper by the unidentified driver-occupant of a Mercury Cougar was inadequately tied to petitioner to support the inference that he was the vendor. The only evidence adduced to connect him with that transaction was the fact that he drove that same Mercury Cougar on October 21. However, since ownership of the car was not proven by any registration records, petitioner's driving the vehicle on one occasion a month later does not demonstrate that he was its owner, nor does it prove that he drove it at the time of the first transaction. This conclusion is reinforced by the fact that a trained surveillance agent who saw the vendor of September 22 attempt to

place a phone call during daylight hours shortly after the transaction, did not identify the caller as petitioner. Thus, the only competent evidence adduced to support the conspiracy is the sale of October 21, in which petitioner unquestionably participated.[3] That single sale is only competent evidence, however, to prove a buyer-seller relationship between petitioner and Cooper – a relationship which is universally deemed *not* to establish a conspiratorial scheme. "In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective." *United States v. Ford,* 324 F.2d 950, 952 (7th Cir. 1963). This is especially true herein, because there was no evidence to otherwise illuminate the transaction since Cooper was a fugitive at the time of trial, and Agent Lee never met with nor even saw petitioner prior to his arrest on April 15, 1981. Moreover, on the remote chance that petitioner is deemed by the evidence to have participated in two sales to Cooper one month apart, those two isolated transactions considered together still do not yield a conspiracy finding.

Since the theory of the remaining substantive distribution count was that the Cooper to Lee narcotic transfer concomitantly established petitioner's vicarious guilt by virtue of his criminal partnership with Cooper, failure to prove the conspiracy, *a fortiori,* entitles petitioner to a judgment of acquittal on this count which hinged on the very existence of that conspiracy.

---

[3]Since we are required to view the evidence in the light most favorable to the Government, we have totally disregarded petitioner's strong defense on the merits which was credited by less than a unanimous jury. See Tr. I 222-261.

ARGUMENT

I

Abney v. United States, 431 U.S. 651 (1977), Authorizes The Instant Interlocutory Appeal Which Raises a Concededly Legitimate Double Jeopardy Claim.

Since *Burks* v. *United States,*[6] it is clear that a criminal defendant can challenge the sufficiency of the evidence presented at his first trial, which ended in a hung jury, when appealing his conviction at the second trial.[7] This much respondent has readily conceded in the court of appeals[8] and this Court.[9] Thus, the second *trial* itself would be impermissible, because it implicates the defendant's right not to be twice placed in jeopardy. The court of ap-

---

[6]437 U.S. 1 (1978).

[7]In addition to the instant case, Pet. Ap. 11a-14a; See, *United States v. Balano,* 618 F.2d 624, 632 n. 13 (10th Cir. 1979); *United States v. Bodey,* 607 F.2d 265, 267-268 (9th Cir. 1979) (reversed); *United States v. Wilkinson,* 601 F.2d 791, 794-795 (5th Cir. 1979); *United States v. Rey,* 641 F.2d 222, 225-226 (5th Cir. 1981); *United States v. Becton,* 632 F.2d 1294, 1296 (5th Cir 1980).

[8]"Indeed, in the present case the government concedes that Richardson's insufficiency claim will not be lost if it is not reviewed at this time, noting that 'in the event he is convicted, [Richardson] can raise [the insufficiency claim] on appeal from that conviction.'"[18] "[18]Appellee's brief at 14 n. 3. . . ." (Pet. Ap. 5a-6a) (Brackets in original).

[9]"It is nevertheless worth noting that the reversal of any conviction obtained at the retrial on the ground that the evidence at the first trial was legally insufficient would afford the petitioner substantial and valuable relief, even if it does come too late to avoid the retrial itself." (Resp. Opp. 7 n. 5).

• • • •

"[T]his case presents the common, if lamentable, situation in which the accused must bear 'the discomfiture and cost of a prosecution' before his claim may properly be 'reconsider [ed] by an appellate tribunal'." (Resp. Opp. 11).

peals correctly summed up the litigants' position on this score:

> "[T]he double jeopardy clause is violated if the government has a full and fair opportunity to convict a defendant, fails to produce enough evidence to sustain its constitutional burden to present legally sufficient evidence, and is then given another opportunity to obtain a conviction." (Pet. App. 14a).

It is at this juncture that we part company with the lower court and respondent in pinpointing the stage in the judicial process at which petitioner can enforce his constitutional right not "to be twice put in jeopardy." They urge that petitioner's right to avoid a second unconstitutional trial can only be vindicated by undergoing a second unconstitutional trial.[10] We contend that the remedy of immediate interlocutory review vouchsafed to petitioner by *Abney v. United States,*[11] protects him from having to "run the gauntlet" anew. As we read that opinion, it seems clear to us that its animating principle was grounded in the notion that the Double Jeopardy Clause stands as a bar to *trials* that would do violence to its precepts. Accordingly, interlocutory appeals were authorized lest the rights protected vanished before they could be established and enforced. Courts of appeals were thus, entrusted with the duty of preventing unconstitutional retrials – certainly

---

[10]Since the court of appeals dismissed for want of jurisdiction, the posture of the case is analogous to that of a complaint being dismissed for want of jurisdiction requiring the allegations therein to be taken as true. *Cooper v. Pate,* 378 U.S. 546 (1964). Therefore, for purposes of the present review it must be assumed, as alleged by petitioner, that the evidence adduced at trial to support the indictment was legally insufficient to shoulder its burden.

[11]431 U.S. 651, 663 (1977).

not encouraging them. Nothing demonstrates this purpose as cogently as the following language from Abney:

> "The rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. . . . It is a guarantee against being twice put to *trial* for the same offense . . . . Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.
>
> We therefore hold that pretrial orders rejecting claims of former jeopardy, . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." 431 U.S. 660-662. (emphasis in original) (unanimous judgment).

Petitioner, as did the petitioner in *Abney*, contests the very authority of the "Government to hale him into court to face trial on the charge against him"[12] and thus, advances a claim which lies at the very nerve-center of the Double Jeopardy Clause. If he is correct in his evaluation of the evidence as we must assume, why should this petitioner endure an unconstitutional retrial before his right to be set free is recognized. To deny petitioner his appeal

---

[12]431 U.S. 659.

would, in effect, create a new class of deferred double jeopardy case not entitled to the "full protection"[13] of the Double Jeopardy Clause when no valid reason for the disparity appears to exist. Petitioner, like all others who advance a legitimate double jeopardy claim would be forced to endure "the personal strain, public embarrassment, and expense"[14] of an erroneous retrial. But that is not the end of it. For, if convicted, petitioner would further endure the lengthy deprivation of his liberty while his rights were being vindicated on appeal. In our experience, denial of bond pending appeal from a conviction would be routine herein because of the nature of the case, petitioner's prior conviction, and the Government's tenacity in these matters. Thus, the totality of the impact resulting from the denial of petitioner's right to interlocutory review would yield nothing less than a startling and unwarranted departure from *Abney*.

All those who would deny petitioner his sought-after remedy do so by giving *Abney* grudging application, rather than recognizing the broad principle of review it established. Despite the numerous clear-cut arguments that innervate petitioner's claim, respondent seizes upon a phrase in *Abney* which, we are assured, signals petitioner's retrial. The coveted language appears during the Court's discussion of the second prong of the so-called three-prong test of *Cohen v. Beneficial Industrial Loan Corp;*[15] the Government having conceded that petitioner has satisfied the other two prongs (Resp. Opp. 7 n.5).

---

[13] *Id.*, at 662.

[14] *Id.*, at 661.

[15] 337 U.S. 541 (1949).

> "[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him." 431 U.S. at 659.

Respondent's argument proceeds, that since the sufficiency of the evidence inquiry goes to the very heart of the prosecution, the double jeopardy issue it raises is not collateral to the proceeding; accordingly, petitioner has not met the second prong of the collateral order test. (Resp. Opp. 7) Deeper analysis, however, discloses the erroneous reasoning that underlies this theory.

In the double jeopardy context presented by this case, the alleged insufficiency of the evidence spawns dual results. On the one hand it generates the very constitutional issue sought to be reviewed and, on the other, it traverses the merits of the prosecution. It is, no doubt, this unique self-determining quality of the claim, *i.e.*, one which, simultaneously, provides both the question and the answer, that has led respondent and several courts of appeals astray.

By first generating the double jeopardy issue — insufficient evidence resulting in a hung jury does not permit the Government another chance to secure a conviction — the second prong of the *Cohen* test has been met by the raising of a collateral and independent bar to the prosecution. This is an identical result it shares with all double jeopardy claims, no matter how otherwise divergent their factual grounds for relief may be. Merely because petitioner's claim also possesses a secondary role as the determinant of

whether or not the double jeopardy violation has been proven, in fact, cannot annul its main purpose of establishing a collateral bar and unlocking the appellate door. By concentrating on the claim's more visible but subordinate factual role, respondent and the cases it relies upon have inverted the correct order of priorities and, accordingly, hit the wrong target by probing the answer instead of evaluating the question.

E.g.

> "Therefore, since Richardson's double jeopardy claim exists at the appellate level *only* if the district court's sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time . . . [A]nd because that issue is the *only* basis for Richardson's double jeopardy claim, Richardson has failed to make *at this time any* double jeopardy claim which can be reviewed by an appellate court." (Pet. App. 8a-9a) (emphasis in original).

The inevitable result of this approach is the conclusion, that while the alleged insufficiency of the evidence raises a double jeopardy violation, it can only be vindicated after a criminal defendant has "run the gauntlet" of a retrial.[16] A

[16]In addition to the instant case, Pet. Ap. 11a-14a, see *United States v. Rey, supra* n. 6; *United States v. Becton, id.; United States v. Ellis,* 646 F.2d 132 (4th Cir. 1981). But see, *United States v. Sneed,* 705 F.2d 745 (5th Cir. 1983), whose reasoning and result are inconsistent with the earlier *Becton* and *Rey* cases from the same circuit. It was, we believe, the clear insufficiency of the evidence in *Sneed* which prompted the court to retreat from those contrary holdings and authorize interlocutory review. A result the concurring judge in *United States v. Ellis, supra,* would also encourage in the context of insufficient evidence "entirely manifest on the face of the record." 646 F.2d at 136. A practical solution achieved, no doubt, to preclude clearly superfluous, time-consuming retrials, but one which cannot conceptually survive without permitting interlocutory review in this type of case across the board.

rather difficult position to maintain, since the Court has previously rejected this very procedure. *Abney v. United States, supra,* 662.

Alternatively, if we are in error, then it is our contention that the raising of a cognizable double jeopardy claim which if proven, bars the prosecution, *automatically* satisfies the criteria for the collateral order exception as set forth in *Cohen*. In *Abney,* the Court appears to be saying just this.

> "[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principle issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659.

In analyzing this language the court in *United States v. McQuilkin*[17] – the case which caused the conflict in the circuits over the Question Presented – reaches this precise conclusion:

> "Although the evidence which must be reviewed when determining whether a double jeopardy claim has been demonstrated may be the same as that considered on review of a conviction, that factor does not destroy appealability. Even though the evidence is reviewed for its sufficiency, it is, as *Abney* emphasizes, the *nature* of the claim that makes the case eligible for immediate appellate review. The defendant 'is contesting the very authority of the Government to hale him into court to face trial on the charge against him'." 673 F.2d at 685 (emphasis in original).

At bottom, it is fair to say that the Court did not have a situation such as the one at bar in the forefront of its consideration when discussing the *Cohen* factors in *Abney*.

---

[17] 673 F.2d 681 (3rd Cir. 1982).

The opinion, accordingly, assumes the presence of a collateral issue by the mere raising of a double jeopardy violation – a result extant herein. By far the most important *Cohen* factor relied upon in authorizing interlocutory appeals was the third one, *i.e.*, an important right would be irretrievably lost if immediate review were denied. See *United States v. McDonald,* 435 U.S. 850, 860 n.7 (1978).

Accordingly, since petitioner raised a concededly valid double jeopardy claim in the district court, its denial entitled him to immediate interlocutory review.[18]

II

The Evidence Was Insufficient To Support A Conviction For the Conspiracy Alleged In Count One of the Indictment Or The Joint Distribution Alleged In Count Three Thereof

A. The Conspiracy Count

The indictment is a relatively simple pleading which alleges in count one that petitioner and Leroy Cooper conspired from September 22, 1980, to October 21, 1980, to distribute and possess heroin with the intent to distribute

[18]If respondent's opposition to our petition is prologue, we can soon expect the following considerations to be raised in an attempt to defeat interlocutory review:

1. The piecemeal examination of criminal cases such review would entail Resp. Opp. 6.

2. The attendant delay and disruption in the trial courts resulting from these interlocutory appeals *id.*, 5.

3. The increase of frivolous double jeopardy claims on appeal which would burden the already overburdened courts, *id.*, 6.

However, since these very same spectres were advanced by respondent's unsuccessful brief on the merits in *Abney* – pp. 16-18, 28-29, 45-46, 50-51 – there is no reason to believe that they will be any more formidable now in achieving their purpose than they were in 1977.

it. The objective of this joint venture was alleged to be the making of money. In analyzing the sufficiency of the evidence, we view it in the light most favorable to the Government, affording it the benefit of all inferences that logically flow therefrom without regard to the credibility of witnesses. *Glasser v. United States,* 315 U.S. 60, 80 (1942). In assessing the available evidence to determine whether or not the conspiracy was proven and if petitioner was a member thereof, we will exclude from consideration, however, all hearsay statements made by Leroy Cooper implicating petitioner in any such scheme made out of the latter's presence and introduced over objection.

> "[S]uch declaration are admissible . . . , only if there is proof *aliunde* that he is connected with the conspiracy . . . Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence" *Glasser v. United States* supra, 74-75.

See also, *United States v. Gresko,* 632 F.2d 1128, 1131 (4th Cir. 1980) ("[C]o-conspirator's out of court statement is not independent evidence of the very conspiracy on which its admissibility depends"); *United States v. Murzyn,* 631 F.2d 525, 532 n. 13 (7th Cir. 1980) ("The proof of membership must be shown by the alleged co-conspirator's own acts and declarations."); *United States v. Haldeman,* 559 F.2d 31, 118-119 (D.C. Cir. 1976) (same).

From this angle of vision, the overall picture consisted of Agent Lee prodding an unsuspecting Cooper to procure narcotics for him on ten occasions. Only two of these purchases were alleged to be related to petitioner; he being a stranger to the other eight transactions. On September 22, 1980 at about 3 p.m., Cooper bought drugs for $5,000 from an unidentified man in a Mercury Cougar which Cooper redistributed to Agent Lee. A surveillance agent

saw the vendor a short time later as he attempted to place a phone call from a service station. At trial, this agent could not identify this person as petitioner nor did he state that the caller resembled him as to height, build, complexion or the like. No evidence was introduced to establish the registered owner of the Mercury Cougar. Obviously, nothing at this point connects petitioner to the transaction forming count two of the indictment of which he was acquitted.

About one month later on October 21, petitioner drove up to the barber shop in the same Mercury Cougar seen on September 22, had a brief conversation with Cooper and drove off. After Lee arrived at the shop, he and Cooper drove to a location where the latter was to purchase some drugs. Lee gave him $2,500 for this purpose. During these events petitioner was seen getting into a yellow Buick driven by Wesley McCray. Cooper made contact with the Buick resulting in a change of location for the transaction. At that destination McCray *alone* met Cooper and sold him the narcotics for $2,500. Petitioner's fingerprint on the narcotic package certainly thrust him into this sale in light of the other evidence of his involvement that day. However, the fact that petitioner both participated in a narcotic transaction on October 21 and also drove the Mercury, did not provide the requisite link to establish that he was the driver-vendor one month earlier. Since there was no evidence that the car was registered to petitioner and he only drove it on this one verified occasion, it is impossible to conclude that the car belonged to him. Indeed, when the Government sought to prove car ownership it did so by introducing the registration certificate into evidence. The procedure followed when it proved that the yellow Buick was owned by Wesley McCray (Tr. I 289). When this omission is considered along with the fact that it is not uncommon in a major city for an individual

to drive another's car, the isolated fact that petitioner drove the Mercury one day a month after the first transaction is not probative of the sought-after conclusion that he drove it and sold drugs therefrom on the earlier date. This gap between proof and inference is further widened by the following considerations: (1) the trained surveillance agent who tracked the Mercury on September 22 for the very purpose of observing the driver and did observe him attempting to place a phone call during daylight hours, could not identify this suspect as petitioner, (2) this lack of identification coupled with the fact that petitioner strenuously avoided personally delivering any drugs to Cooper on October 21, yield a compelling countervailing inference that petitioner was *not* the driver-vendor on the earlier occasion. Thus, however viewed, the events of September 22 provide no "substantial independent evidence of a conspiracy"[19] to connect petitioner with the first count of the indictment.

---

[19] *United States v. Nixon*, 418 U.S. 683, 701 n. 14 (1974). The *Nixon* formulation is the test applied in the court below and the fifth circuit. *United States v. Slade*, 627 F.2d 293, 307. (D.C. Cir. 1980); *United States v. James* 590 F.2d 575, 580-81 (5th Cir. 1979). Other circuits, discounting the validity of what the Court said in *Nixon*, use a "fair preponderance of the independent evidence" test. *United States v. Wiley*, 519 F.2d 1348, 1350-51 (2d Cir. 1975); *United States v. Trotter*, 529 F.2d 806, 811-812 (3rd Cir. 1976); *United States v. Santiago*, 582 F.2d 1128, 1135 (7th Cir. 1978). Until altered, however, we shall continue to use the *Nixon* "substantial independent evidence of a conspiracy" test throughout this brief, which was referred to by the Court at the time it was announced as the "standard" against which the trial judge should evaluate the evidence. *Nixon, supra*, n. 14 at 701.

This divergence in the circuits recognized by the court below in *United States v. Jackson*, 627 F.2d 1198, 1219 (D.C. Cir. 1980), leads us to another matter. Although our petition at n. 1 indicates that if jurisdiction exists to consider the double jeopardy claim then the sufficiency of the evidence *vel non* would be a fairly included subsidiary question, respondent's opposition suggests, that in the event of finding jurisdiction, then the case should be remanded to the court of ap-

In reality, the only competent evidence adduced to support the conspiracy boils down to the events of October 21. The Government, in addition to its burden of demonstrating substantial independent evidence of a conspiracy, must also establish "beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute." *United States v. Cangiano,* 491 F.2d 906, 909 (2d Cir. 1974). In the instant case this would require substantial independent evidence that petitioner and Cooper had a "partnership in criminal purposes" *United States v. Kissel,*[20] whose goal or specific intent was "to distribute and possess with intent to distribute quantities of heroin." (quoting count one of the indictment). Actually, since McCray sold the drugs to Cooper aided and abetted by petitioner, the evidence more realistically yields a drug conspiracy between petitioner and McCray than one between petitioner and the customer, Leroy Cooper.

On this evidence of one sale, it cannot be concluded that a conspiracy with Cooper was created which petitioner entered into with the specific intent of drug redistribution for financial benefit as the unlawful object of that combination. On the contrary, the sale to Cooper yielded the profit and there is no evidence, let alone substantial independent evidence, that petitioner intended to share in any further profits of his vendee. Fortunately, we do not ap-

---

peals to consider the merits of that claim Resp. Opp. 13 n. 11. We urge that this split further impels the Court to undertake a consideration of the merits of the claim – should appellate jurisdiction exist – in order to quell this unwarranted conflict in the circuits. A not unprecedented evidentiary review in light of *Abney* itself, which explored the merits of the double jeopardy claim after the court of appeals merely affirmed the case by a judgment order 530 F.2d 963 (3rd Cir. 1976).

[20]218 U.S. 601, 608 (1910).

proach these facts from a clean slate and need only look to the Learned Hand opinion in *United States v. Peoni,* 100 F.2d 401 (2d Cir. 1938), and its progeny, to demonstrate the utter failure to prove the conspiracy alleged herein.

In that text-book case the evidence showed that Peoni sold counterfeit bills to one, Regno; and Regno resold the same bills to one, Dorsey. All three knew the bills were counterfeit and Dorsey was later arrested while trying to pass them. The issue was whether Peoni was party to a conspiracy by which Dorsey was to possess the bills. The Government's theory was that, as Peoni put the bills in circulation and knew that Regno would be likely not to pass them himself, but to sell them to another guilty possessor, the possession of the second buyer was a natural and foreseeable consequence of Peoni's original act. Judge Hand thought that this theory would have been of some moment had it been a civil case, but that the argument was unavailing to underpin a conspiracy charge.

> "Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. . . . Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it . . . ." 100 F.2d at 403.

Thus, at best we have herein a buyer-seller relationship between petitioner and Cooper with no further purpose or intent proved other than to effect the sale. Even if we assume that petitioner understood that Cooper would resell the drugs that does not mean that he intended to

become Cooper's partner in that endeavor and share in the profits. Like Peoni, petitioner "had no concern with the [drugs] after [Cooper] paid for them."

Furthermore, in the case at bar the Government is precluded from even arguing that petitioner was aware that the drugs in question were targeted for resale as opposed to personal use. While expert testimony concerning the quantity and quality of the heroin might have permitted an inference of foreseeable resale, the prosecutor never adduced such testimony. When he sought to have Agent Lee testify as an expert on this score our objection to Lee's testimony was sustained (Tr. I 194-196). Thereafter, the prosecutor declined the court's specific invitation to produce competent expert testimony concerning the drugs (Tr. I 201).

Additional authoritative support for our conclusion is provided by *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972), wherein Godwin bought fifty thousand (50,000) amphetamine tablets from Spanos. On another occasion Spanos refused to sell him pills because he believed he was being followed. Godwin testified for the prosecution that he had known Spanos for about a year and a half and "on occasions" bought pills from him. He, Godwin, resold the pills purchased from Spanos to an undercover agent named Herring. At trial, Spanos was convicted upon an indictment charging him and Godwin with a conspiracy to sell and possess for sale stimulant drugs. The Court of Appeals reversed the conviction relying on *Peoni*. "[T]here is no evidence that Spanos had agreed with Godwin that Godwin was to resell to Herring or to anyone else. This does not show the charged conspiracy even, *prima facie*." 462 F.2d at 1015. The Court so held even though it specifically found: "Like Peoni, Spanos sold, presumably knowing that Godwin would probably resell . . . ." *Id.*, at

1017. *Spanos* was cited with approval by the Court in *United States v. Nixon, supra,* 701 n.14. See also, *United States v. Meyers,* 646 F.2d 1142, 1145 (6th Cir. 1981) ("Insufficient evidence to show that Calvin and Meyers conspired to distribute cocaine. The evidence showed only a buyer-seller relationship between them."); *United States v. Bostic,* 480 F.2d 965, 969 (6th Cir. 1973) ("There is no evidence that . . . Bartlett ever entered a single counterfeiting conspiracy with [4 persons] to . . . sell and utter counterfeit money . . . The utmost that could be claimed . . . is that [he] sold counterfeit bills to Bostic. If it be assumed that he did sell such . . . bills to Bostic, the law is plain that he was not guilty of the conspiracy claimed."); *United States v. Ford,* 324 F.2d 950, 952 (7th Cir. 1963) ("The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."); *United States v. Reina,* 242 F.2d 302 (2nd Cir. 1957); *United States v. Koch,* 113 F.2d 982, 983 (2d Cir. 1940) ("The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest.").

To contrast the failure of this evidence to prove a conspiracy, we can compare the case with several that have deemed the facts sufficient to warrant the finding that a conspiratorial scheme existed aimed at redistribution. In *United States v. Calabro,* 467 F.2d 973, 981 (2d Cir. 1972), the court held that the vendor's participation "went deeper than supplying the [stolen bonds] in a few isolated transactions with no concern for the remainder of the operation."

The vendor supplied most of the bonds cashed by the vendees and their agents, often receiving a percentage of the proceeds. "The forging and uttering were thus a prerequisite to his realization of profit." In *United States v. Campisi,* 306 F.2d 308, 309, 311 (2d Cir. 1962), the vendors of stolen bonds sold some of the bonds to the same group on credit over an eight-month period. The court held that the "credit aspect of the transaction suggests that if the bonds could not be resold [the vendors] would not be paid." Accordingly, the vendors were deemed to have the requisite "stake in the success of the venture" to support a conspiracy conviction. In *United States v. Sin Nagh Fong,* 490 F.2d 527, 531 (9th Cir.1974), appellant sold, or was about to sell (when arrested), heroin and cocaine to Rogers four times in a 31-day period. During that month they also had a drug related conversation which was overheard by a federal agent. Even though the evidence of conspiracy was circumstantial, the court held that such concert of purpose was proved. First, based on *expert testimony* in the case about the drugs, a reasonable fact finder could conclude that appellant sold wholesale quantities to Rogers for redistribution. This coupled with "multiple sales over a relatively brief period while [appellant] actively encourag[ed] Rogers to expand the volume of his business"[21] was sufficient to establish a conspiracy. "Appellant had a stake in the success of Rogers' activities" 531 n. 4.

In the case at bar, there is no direct testimony of any agreement between Cooper and petitioner. Cooper was a fugitive at the time of trial, and Agent Lee never met with or even saw petitioner prior to his arrest. While Cooper may have been buying drugs from others for Lee, the

[21]This conclusion was based on the overheard conversation.

available facts herein only yield the conclusion that on October 21 petitioner and McCray sold drugs to Cooper for $2500. That single act provides no rational connection for any inference that petitioner and Cooper had any understanding relative to future transactions or shared mutual goals. For all we know, or can ever know, October 21 was the end of the line between the parties. Indeed, the objective facts revealing Cooper's multiple sales to Lee – totally unrelated to petitioner – drives the latter's one sale but deeper into the realm of a "casual transaction."

Moreover, on the remote chance that the totality of the evidence is deemed to prove two sales by petitioner to Cooper one month apart, that additional sale does not alter the absence of a conspiracy finding. Once again, we would have but two *isolated* transactions in a continuing series of ten between Cooper and Lee extending into December, which fall outside the ambit of conspiracy. Since there is zero evidence that petitioner knew that Cooper was purchasing the drugs for anyone else, the fact that he bought drugs for $5,000 one time and $2,500 another about a month apart, could very well lead the vendor to the conclusion that these drugs were intended for his personal use.

The sum of $5,000 for a one-month personal drug supply may not be excessive, especially when there is no countervailing expert testimony concerning the potential commercial impact of these drugs as opposed to personal use, or personal use coupled with sales to support the habit, because the prosecutor declined to introduce any such testimony (Tr. I 201).

At bottom, this record when viewed in the light most favorable to the Government falls short of proving by "substantial independent evidence" the conspiracy alleged in count one of the indictment.

"Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."[8]

[8]"This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. . . ."
Direct Sales Co. v. United States, 319 U.S. 703, 712 (1943).

B. The Substantive Count

The theory of count three (as well as count two) was that the sale or distribution to Agent Lee by Leroy Cooper concomitantly launched petitioner's culpability by virtue of his criminal partnership with Cooper. *Pinkerton v. United States,* 328 U.S. 640 (1946). Since petitioner did not actually participate in that distribution, a partnership theory of criminal liability was the only one available on the facts. Since we have demonstrated that petitioner was entitled to a judgment of acquittal on the conspiracy count, *a fortiori,* he is also to be acquitted for the substantive violation contained in count three which hinged on the very existence of that conspiracy. *Travers v. United States,* 335 F.2d 698 (D.C. Cir. 1964). See also *Sealfon v. United States,* 332 U.S. 575 (1948).

CONCLUSION

There is jurisdiction to consider petitioner's alleged double jeopardy violation which the facts, upon review, clearly establish. Accordingly, the case should be remanded with directions to dismiss the indictment.

Respectfully submitted,

Allan M. Palmer
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Robert D.H. Richardson

November 1983